

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
WASHINGTON, DC 20037
TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

William A. Mullins
wmullins@bakerandmiller.com

Direct Dial: (202) 663-7823



May 25, 2005

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

ENTERED
Office of Proceedings

MAY 25 2005

Part of
Public Record

Re: STB Ex Parte No. 230 (Sub-No. 9), Improvement Of TOFC/COFC
Regulation, WTL Rail Corporation, Petition For Partial Revocation Of
Exemption;
STB Docket No. 42092, WTL Rail Corporation, Petition For Declaratory Relief

214067
214068

Dear Secretary Williams:

Enclosed herewith are an original and 11 copies of the Opposition of The Kansas City Southern Railway Company to the petitions filed by WTL Rail Corporation in the above-captioned proceedings. As can be seen from the certificate of service, a copy of this Opposition has been served today on all parties of record by first class mail, postage prepaid, or by a more expeditious form of service.

Please acknowledge receipt of this filing by stamping the enclosed eleventh copy of the filing and returning it to the person making this delivery. If there are any questions concerning this matter, please feel free to contact me by phone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,

William A. Mullins

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 230
(SUB-NO. 9)

214069

**IMPROVEMENT OF TOFC/COFC REGULATION,
WTL RAIL CORPORATION, PETITION FOR PARTIAL REVOCATION OF
EXEMPTION**

STB DOCKET NO. 42092

214068

WTL RAIL CORPORATION, PETITION FOR DECLARATORY RELIEF

**OPPOSITION OF
THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

ENTERED
Office of Proceedings

MAY 25 2005

Part of
Public Record

**Robert B. Terry
W. James Wochner
KANSAS CITY SOUTHERN
427 West 12th Street
Kansas City, MO 64105
Tel: (816) 983-1303
Fax: (816) 983-1227**

**William A. Mullins
David C. Reeves
BAKER & MILLER PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849**

**Attorneys for The Kansas City Southern
Railway Company**

May 25, 2005

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**STB EX PARTE NO. 230
(SUB-NO. 9)**

**IMPROVEMENT OF TOFC/COFC REGULATION,
WTL RAIL CORPORATION, PETITION FOR PARTIAL REVOCATION OF
EXEMPTION**

STB DOCKET NO. 42092

WTL RAIL CORPORATION, PETITION FOR DECLARATORY RELIEF

**OPPOSITION OF
THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

The Kansas City Southern Railway Company ("KCSR") hereby opposes the petitions for relief filed by WTL Rail Corporation ("WTL") in the above-captioned proceedings on May 5, 2005. KCSR urges the Board not to partially revoke the long-standing TOFC/COFC exemption to deal with the simple contract issue that WTL's petitions raise. Moreover, WTL has not presented reasonable grounds for the Board to conclude, even assuming the TOFC/COFC exemption didn't exist, that a statutory violation has occurred that requires a remedy from the Board. Absent the ability to point to any statutory basis for relief, even if the TOFC/COFC exemption was lifted, and the fact that the dispute involves purely contractual issues, the Board should deny WTL's requests for interim and permanent relief, and should reject WTL's invitation to open a declaratory order proceeding.

Discussion

A. Because The Matter Is Simply A Contractual Dispute, The Board Should Allow The Courts Or Marketplace Negotiations To Address The Issue

Broken down to its essence, what is at issue in this proceeding is the cancellation, according to its terms, of a privately negotiated agreement known as a "Trailer Use Agreement." As with several other Class I railroads, KCSR had negotiated and entered into such a private contract by which KCSR agreed to handle WTL-owned or leased motor vehicle trailers. KCSR, as well as several other railroads, but not all railroads, individually determined that such an agreement no longer made sense in today's economic environment. As a result, KCSR notified WTL of its intent to terminate the agreement and did so in accordance with the terms of the agreement. Rather than accept that termination and attempt to negotiate a new agreement that would make sense to both parties in today's economic environment, WTL filed the instant petitions.

WTL does not dispute that the terminations were proper under the contract terms that it agreed to when it entered the agreements. Instead, WTL simply objects to the terminations and seeks to have the Board save it from honoring what it agreed to. As a result, WTL wants the Board to effectively void the cancellation provisions of the agreement and bind KCSR to continued performance of the agreement, notwithstanding the fact that KCSR's termination was legally done and notwithstanding the fact that the agreement no longer makes economic sense for KCSR. Such relief is not worthy of the Board's attention nor is it appropriate or required by the ICC Termination Act of 1995 ("ICCTA").

The Board has often said that it is not the agency's role to interpret or enforce contracts between private parties. *See, e.g., Lackawanna County Railroad Authority-Acquisition Exemption-F&L Realty, Inc.; Delaware-Lackawanna Railroad Co., Inc.-Operation Exemption-*

Lackawanna County Railroad Authority, STB Finance Docket Nos. 33905 and 33906, 2001 STB LEXIS 814 (served Oct. 22, 2001) at *14 (interpretation of contracts is within the purview of courts), and *Burlington Northern Railroad Company—Order for Just Compensation—National Railroad Passenger Corporation (Amtrak)*, 7 I.C.C.2d 74, 1990 ICC LEXIS 319 (Oct. 9, 1990) at *6 (the Board does not enforce contracts).¹ Even more clearly, it is not the Board's role to create new contract rights for parties to private contracts, particularly through the WTL-proposed use of a "housekeeping stay," which would bind KCSR to the terms of the terminated contract throughout a potentially protracted litigation period, despite KCSR's acknowledged right to terminate that contract.²

WTL has two remedies here: either resort to the courts to show that KCSR has somehow unlawfully terminated its agreement; or enter into private negotiations with KCSR to reach a new agreement that makes economic sense to both parties. WTL has done neither. Instead, WTL seeks, effectively, regulatory nullification of contract provisions that WTL does not like, coupled with enforcement of those provisions that WTL does like. Yet, the Board has no authority to nullify such contracts between a railroad and its supplier or to impose a new agreement on KCSR without KCSR's consent. Even if the Board had such authority, no justification has been

¹ This notion is reinforced by the provisions of ICCTA which specify that the sole forum for enforcement of contracts between shippers and carriers is the courts. See 49 U.S.C. §§10709(c)(2) and 14101(b)(2). This principle should apply even more strongly to WTL, which is not a shipper but a supplier of railroad equipment.

² To KCSR's knowledge, the Board has previously used so-called "housekeeping stays" only rarely, only for brief periods, and only to stay the imminent effectiveness of an order or exemption issued by the Board. None of these conditions apply to WTL's request for a "housekeeping stay" of KCSR's termination of a contract with one of its suppliers, WTL. Neither is any stay appropriate in a context in which WTL's own president says, "the trailer pool . . . is in danger of shrinking *in the next few years* to the point where railroads will no longer" be able to meet "normal" demand. Lombardo Verified Statement ("Lombardo V.S.") at 5.

presented to warrant exercising that power in this case. The case is one of a simple dispute between a railroad and its equipment supplier. It should remain so. The Board should avoid becoming involved and allow the marketplace to work to resolve these issues.³

B. Even Assuming No TOFC/COFC Exemption Existed, WTL Has Failed To Show That It Would Have A Statutory Basis For Relief So As To Warrant The Board Beginning A Proceeding To Resolve WTL's Concerns

As a prerequisite to the Board even considering whether it should revoke the TOFC/COFC exemption to resolve WTL's concerns, WTL needs to establish that it has a statutory basis on which to proceed in the absence of such an exemption. WTL has not shown even preliminarily that KCSR's termination of its contract with WTL violates any provision of ICCTA. WTL claims that KCSR's actions would violate Section 11121(a). WTL Petition at 6 and 9. That provision requires a rail carrier, including KCSR, to "furnish safe and adequate car service." WTL makes no effort to show that KCSR, or for that matter any other railroad, will be unable to provide "safe" equipment as a result of its cancellation of its agreement with WTL. Failure to meet even this basic predicate for seeking relief justifies the Board denying the relief requested by WTL.

As for the second statutory element, WTL likewise fails to show that KCSR will be unable to provide "adequate" car service. WTL does make various claims that 30,000 of 60,000 "rail controlled" trailers will be withdrawn from service, but even if true, such a statement doesn't show that the railroads, let alone KCSR, will be unable to provide adequate equipment so

³ If the Board accepted WTL's invitation to manufacture new contract rights for WTL, the Board could expect other suppliers to the railroads – suppliers of rail, suppliers of fuel, equipment manufacturers, and others – to bring their contract disputes to the Board as well.

as to violate Section 11121. Furthermore, the 30,000 figure is vastly overstated,⁴ designed to mask the minimal impact of what is truly at issue in this proceeding—the use of WTL’s equipment. In fact, WTL itself claims that it only owns 950 of the trailers out of the pool of approximately 60,000 such trailers used by the railroads. Even assuming WTL’s equipment would not be leased or sold to some other party in the supply chain and that these 950 trailers would simply go unused, how the disappearance of WTL’s equipment would prevent KCSR or any other railroad from providing “adequate” equipment in violation of Section 11121 is unexplained. WTL has simply failed to show that changing the classification of WTL’s few units of equipment from “railroad-owned/controlled” to “private” will have any appreciable effect KCSR’s ability to “furnish safe and adequate car service.”

The truth is that cancellation of WTL’s trailer supply contracts with the railroads will not have nearly the impact on availability of trailers that WTL suggests. Upon closer examination, it is clear that WTL isn’t concerned about the shippers having adequate equipment or that the railroads will be unable to meet their statutory obligations; rather, WTL is simply concerned about its own equipment. As WTL admits, its real concern is that the railroads’ actions will “deny small intermodal customers the equipment *WTL* furnishes,” WTL Petition at 9 (emphasis supplied). It does not claim that shippers will be without any equipment, but rather, only without WTL equipment. If, however, the elimination of WTL’s equipment “will force shippers to find

⁴ If this figure were true, one would expect that the major trailer suppliers named in WTL’s testimony, XTRA and TIP, which WTL alleges contribute 73% of the trailers currently handled as railroad-owned/controlled, would be joining WTL’s petition. The fact that they have not joined WTL strongly indicates that WTL’s concerns are overstated.

more expensive but unsatisfactory alternatives,” as claimed by WTL, one would expect many shippers and trade associations to be supporting WTL’s petition. Their absence is telling.⁵

Perhaps realizing that its statutory claim of a violation of Section 11121 is inadequate, WTL also claims that the railroads’ actions constitute an unreasonable practice in violation of Sections 10702(2) and 10704(a)(1). This claim fails as well. It is not an unreasonable practice to cancel private contracts with a company that only supplies 950 trailers to the rail industry where there is already an excess of trailer capacity,⁶ plenty of competitive alternatives for shippers, and plenty of competition from other modes.

TOFC/COFC was first exempted over 20 years ago precisely because intense and expansive competition in the marketplace made regulation unnecessary. *See Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981). In exempting TOFC/COFC service, the ICC stated, “Considerable comment was directed to our findings that the service we are exempting is highly competitive and that the exemption was unlikely to result in abuses of market power. We see no reason to retreat from these findings.” *Id.* at 734. WTL’s petitions evidence no reason for the Board to retreat from those findings now either.

WTL’s president testifies that pool trailers, like WTL’s, contribute only one-half of estimated annual trailer loadings. *Lombardo V.S.* at 4. He also describes shippers currently

⁵ Similarly, the comments of the two onion-shipping interests that support WTL’s petition – San Andreas Fast Forwarding (“SAFF”) and the National Onion Association (“NOA”) – decrying “reduction and ultimately elimination of the railroad-controlled trailer fleet” and “railroad intentions to curtail and even cancel conveyance via van trailers” are vastly overstated and do not establish that rates to shippers will increase or that the railroads are violating their obligations under Section 11121.

⁶ Even WTL’s witness John Robinson acknowledges the risk to the railroads of “holding surplus empty ‘railroad controlled’ trailers.” Robinson Verified Statement at 3. This statement belies WTL’s claims that shippers are in dire need of its trailers. Forcing surplus trailers onto an already busy rail system would impede critical improvements to operational efficiency.

using pool trailers as having the options of using for-hire and private motor carriage. *Id.* at 5. Meanwhile, SAFF describes its experience shipping onions in refrigerated boxcars as being slow but "cost effective" compared to highway or intermodal service. SAFF letter at 1. It also has shipped in intermodal containers, while most of its competitors ship by truck. *Id.* at 2. These statements show that shippers will continue to have many price/service options available to meet their needs, even without WTL's trailers. The shippers also will continue have the option to lease WTL's equipment directly from WTL, rather than through an intermediary railroad. In short, given such a competitive environment, it is not an unreasonable practice for KCSR to make a determination that its private agreement with WTL is no longer economically viable and to cancel that agreement consistent with its terms.


Thus, even if one assumes that there was no TOFC/COFC exemption in existence and that WTL could file a complaint in the first instance, WTL has failed to show a statutory basis under which the Board should proceed to hear its complaint. KCSR would not be unable to provide safe and adequate equipment nor is it an unreasonable practice to cancel a contract involving the supply of equipment in a highly competitive marketplace environment. Without a statutory basis from which to seek relief, there is no need for the Board to begin a proceeding to consider partially revoking the TOFC/COFC exemption. In fact, doing so would be contrary to numerous provisions of the Rail Transportation Policy. *See* 49 U.S.C. Sections 10101((1)(competition should establish rates and service, not regulation); 10101(2)(the STB should attempt to minimize regulation); 10101(4 & 5)(railroads should be able to compete against other modes and develop policies to do so); and 10101(7)(regulatory barriers should be reduced).

Conclusion

WTL's petitions ask the Board to override contractual terms to which WTL freely agreed and to force KCSR and other carriers to continue to pay for and care for WTL's equipment. WTL presents no adequate justification for the Board to violate private contracts, failing to show either that equipment supply will be inadequate or unsafe. Likewise, WTL has failed to show that KCSR's actions were unreasonable given the highly competitive conditions in the TOFC/COFC marketplace. Those competitive conditions have not changed so as to warrant regulatory intervention. Accordingly, the Board should deny WTL's petition to begin a proceeding to partially revoke the TOFC/COFC exemption, to issue a "housekeeping stay," or to issue a declaratory order. The Board should simply deny WTL's requested relief and allow the competition and the marketplace to resolve these issues.⁷

Respectfully submitted,

Robert B. Terry
W. James Wochner
KANSAS CITY SOUTHERN
427 West 12th Street
Kansas City, MO 64105
Tel: (816) 983-1303
Fax: (816) 983-1227



William A. Mullins
David C. Reeves
BAKER & MILLER PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849

Attorneys for The Kansas City Southern
Railway Company

May 25, 2005

⁷ Should the Board institute a proceeding or grant any other relief requested by WTL, KCSR reserves the right to file evidence and further legal argument with the Board in such proceedings.

CERTIFICATE OF SERVICE

I have this day served a copy of the foregoing Opposition Of The Kansas City Southern Railway Company upon all other parties of record by depositing a copy in the U.S. mail in a properly addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Dated: May 25, 2005



William A. Mullins
Attorney for The Kansas City Southern
Railway Company